



# Internet Hoaxes: Public Regulation and Private Remedies

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## Internet Hoaxes: Public Regulation and Private Remedies

### ***Fwd: Toxic tampons***

*I heard many tampon makers would include asbestos in the tampon. Why? Because asbestos makes you bleed more... if you bleed more, you're going to need to use more....*

*This month's Essence magazine<sup>1</sup> has a small article about this and they mention two manufacturers of a cotton alternative. The companies are Organic Essentials @ (800) 765-6491 and the Black-owned Terra Femme @ (800) 755-0212. ...*

*HERE'S THE SCOOP: Tampons contain two things that are potentially harmful: Rayon (for absorbency) and dioxin (a chemical used in bleaching the product). The tampon industry is convinced that we, as women, need bleached white products – they seem to think that we view the product as pure and clean. The problem here is that the dioxin produced in this bleaching process can lead to very harmful problems for a woman. Dioxin is potentially carcinogenic (cancer-associated) and is toxic to the immune and reproductive systems. ...*

*Rayon contributes to the danger of tampons and dioxin because it is a highly absorbent substance and therefore when fibers from the tampons are left behind in the vagina (as usually occurs), it creates a breeding ground for the dioxin, and stays in a lot longer than it would with just cotton tampons. This is also the reason why TSS (toxic shock syndrome) occurs.*

*WHAT ARE THE ALTERNATIVES? Using feminine hygiene products that aren't bleached (which causes the dioxin) and that are all cotton (the rayon will leave fibers and "breeding grounds" in the vagina)... Use tampons that are made from 100% cotton, and that are unbleached. Unfortunately, there are very, very few companies that make these safe tampons. They are usually only found in health food stores. ...*

*WHAT TO DO NOW: Tell people. Everyone. Inform them. We are being manipulated by this industry and the government, let's do something about it!*<sup>2</sup>

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<sup>1</sup>See Pamela Johnson, *Toxic Warning*, ESSENCE, Aug. 1998 at 10.

<sup>2</sup>Barbara Mikkelsen, *Asbestos in Tampons* (visited Jan. 8, 2000) <http://www.snopes.com/toxins/tampon.htm> (reprinting and then debunking the "toxic tampon" e-mail).

## **Fwd: Carcinogenic Shampoo**

*Check the ingredients listed on your shampoo bottle, and see if they have this substance by the name of Sodium Laureth Sulfate, or simply SLS [sic].<sup>3</sup> This substance is found in most shampoos, and manufacturers use it because it produces a lot of foam and it is cheap. BUT the fact is that SLS is used to scrub garage floors, and it is very strong. It is also proven that it can cause cancer in the long run. ...*

*By the way, Colgate toothpaste also contains the same substance to produce the "bubbles." ... Research has shown that in the 1980s, the chances of getting cancer is 1 out of 3, which is very serious.*

*So I hope you will take this seriously and pass this on to all the people you know, and hopefully, we can stop giving ourselves the cancer virus.*

*Check your bottles and toothpaste!<sup>4</sup>*

## **Fwd: Procter & Gamble worships the devil**

*The president of Proctor [sic] and Gamble appeared on the Phil Donahue show on March 1, 1994. He announced that due to the openness of our society, he was coming out of the closet about his association with the church of Satan. He states that a large portion of the profits from Procter and Gamble products goes to support the Satanic Church. When asked by Donahue if stating this on television would hurt his business, he replied, "There are not enough Christians in the United States to make a difference."*

*Below is a list of Procter and Gamble products:*

*...*

*Right-minded people should not purchase any of these products. They will be contributing to the support of the Church of Satan. Inform other people about this please! STOP buying Procter and Gamble products, and lets [sic] show the president of P&G that there ARE enough decent people to make a difference. I urge you to make copies of this notice and pass it on to as many people as you can. We need to stand up and be counted, especially on a matter such as this. Forward this to as many people as you can!!!!!!...*

*\*\*GOD BLESS\*\*<sup>5</sup>*

These e-mails are samples of rumors that are forwarded endlessly around

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<sup>3</sup>The e-mail refers to sodium *laureth* sulfate (SLES), but the rumor also encompasses sodium *lauryl* sulfate (SLS), another detergent commonly used on cosmetics. For the sake of convenience, I use the abbreviation SLS to refer to both compounds. See American Cancer Society, *Sodium Lauryl Sulfate* (visited Jan. 10, 2000) [http://www2.cancer.org/zine/dsp\\_StoryIndex.cfm?fn=004\\_09231998\\_0](http://www2.cancer.org/zine/dsp_StoryIndex.cfm?fn=004_09231998_0).

<sup>4</sup>*Shampoo-poo* (visited Jan. 8, 2000) <http://www.snopes.com/toxins/shampoo.htm> (reprinting and debunking the myth of carcinogenic shampoo ingredients).

<sup>5</sup>*CMI un-related, but entertaining nonetheless* (visited January 8, 2000) <http://www.q7.com/%7Edarrell/archive/cmi/199700/msg00429.html>.

the Internet or posted on web sites, threaded discussions, or electronic bulletin boards. Though superficially amusing, these Internet hoaxes lead to consumer confusion and pose a potentially serious problem to the manufacturers of the targeted product or the maligned company. With the expansion of the Internet and electronic commerce, the increasing use of such hoaxes to defraud consumers or harm competitors creates pressure on both private industry and public regulators to develop strategies that effectively redress this novel twist on an age-old problem. Government regulators and private companies already possess the tools to combat these rumors, but an effective quelling of Internet hoaxes will require a reassessment of enforcement priorities and techniques.

This paper begins with a brief overview of the psychology of rumor and a discussion of the impact of Internet technology on the dissemination of rumors. Part II examines the three consumer rumors presented above as case studies illustrating the problem of Internet hoaxes and attempts by governmental and private actors to halt the circulation of false information about a product or company. Part III discusses whether the traditional enforcement tools used by the FDA and FTC are adequate and appropriate to address consumer rumors, as well as reviewing the options available to private companies adversely impacted by such a rumor.

## I. Rumor and the Internet

To some extent, the definition of what constitutes a rumor can be as nebulous as

the substance of the rumor itself. Folklorists and sociologists are conflicted on the distinction between contemporary legend<sup>6</sup> and rumor.<sup>7</sup> Under a common-sense division, narratives that are directed against specific individuals or institutions are more appropriately analyzed as rumors.<sup>8</sup> This paper is focused on “consumer rumors,” which I define as rumors centered around a specific product or company with an intended purpose of altering consumers’ purchasing habits. Rumors present a compelling, albeit distorted, representation of deeply held human anxieties. Rumors do not exist in a vacuum—“[t]hey are told because they express in a succinct and entertaining form what narrators wish to present as a truth about contemporary life and behavior.”<sup>9</sup> Contemporary legends and rumors address a myriad of topics, ranging from alligators in city sewers to homicidal maniacs with hooks instead of hands to overpriced cookies recipes.<sup>10</sup> Due to their relevance to everyday life, rumors centered on food safety, consumer products, and public health—all areas potentially under the FDA’s jurisdiction—are an extremely common subset of rumors.

Rumors addressing contaminated or adulterated food have a venerable history

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<sup>6</sup>“Contemporary legend” is the preferred term for stories commonly called “urban legends”—a logical use of terminology, since such stories are just as likely to be set in the suburbs or rural areas as in cities. A contemporary legend is defined as “a narrative account set in the recent past and containing traditional motifs that is told as true.” PATRICIA A. TURNER, *I HEARD IT THROUGH THE GRAPEVINE: RUMOR IN AFRICAN-AMERICAN CULTURE* 4 (1993).

<sup>7</sup>See GARY ALAN FINE, *MANUFACTURING TALES: SEX AND MONEY IN CONTEMPORARY LEGENDS* 2 (1992). For academics, the distinction has some teeth—folklorists study contemporary legends, while rumors fall under the purview of social scientists. See TURNER, *supra* note 6, at 4.

<sup>8</sup>See Paul Smith, *On the Receiving End: When Legend Becomes Rumour*, in *PERSPECTIVES ON CONTEMPORARY LEGEND* 197, 197 (Paul Smith, ed., 1984).

<sup>9</sup>Georgina Boyes, *Belief and Disbelief: An Examination of Reactions to the Presentation of Rumour Legends*, in *PERSPECTIVES ON CONTEMPORARY LEGEND*, *supra* note 6, at 64.

<sup>10</sup>For a full menu of contemporary legends and rumors, see the Urban Legends web site at <http://www.snopes.com>.

and remain potent today, due to the centrality of eating to human existence.<sup>11</sup> Fast food rumors are especially common, a likely side effect of the replacement of the home-cooked meal with more convenient but less healthy alternatives.<sup>12</sup> Stories centered on common household products reflect not only the importance of those products to the ordinary consumer, but also that consumer's mistrust of the large corporations that manufacture the majority of those goods. The subjects of "mercantile legends" are invariably companies that produce consumer goods rather than raw materials or goods for industrial consumption.<sup>13</sup> Procter & Gamble, the dominant American producer of household products, is therefore the "logical target" of a variety of rumors.<sup>14</sup> Public health rumors most often focus on AIDS or cancer, the most-feared diseases in contemporary American society.<sup>15</sup>

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<sup>11</sup>For a general history of food-related rumors, see FINE, *supra* note 7, at 125.

<sup>12</sup>A recent, high-tech twist on the oft-circulated "Kentucky Fried Rat" rumor claims that a University of New Hampshire study has revealed that KFC uses featherless, beakless, and nearly boneless genetically altered organisms in its products. Government regulators (presumably the FDA, acting under its authority to regulate food labeling) have purportedly barred the company from marketing these organisms as "chicken," causing the fast-food chain to change its name from Kentucky Fried Chicken to KFC. See Karen Hsu, *Chicken Hoax Takes Flight*, BOSTON GLOBE, Jan. 11, 2000, at B1; see also *Kentucky Fried Chicken Hoax* (visited Jan. 17, 2000) <http://www.unh.edu/BoilerPlate/kfc.html> (the official University of New Hampshire web site debunking the rumor and disclaiming the existence of any study at the university). As of January 17, 2000, the site had logged more than 20,000 visitors.

<sup>13</sup>"Most of the targets [of rumors] are corporations that directly deal with consumers—often producers of foods or household products." FINE, *supra* note 7, at 176.

<sup>14</sup>*Id.* at 146-147. In addition to the Satanism rumors, specific Procter & Gamble products have been the subject of rumor campaigns. For example, one story claims that P&G pot scrubbers contain Agent Orange—in fact, P&G does not manufacture *any* pot scrubbers. See *Scrubbin' Troubles* (visited Jan. 8, 2000) <http://www.snopes.com/toxins/scrub.htm>.

<sup>15</sup>Both AIDS and cancer rumors generally focus on fears related to the transmission of these diseases. The Centers for Disease Control and Prevention (CDC), in response to Internet rumors that HIV was being deliberately spread through infected needles planted in movie theatre seats and phone booth coin return slots, posted a notice to allay public fears on their web site. See *CDC Update: Are these stories true?* (visited Jan. 4, 2000) [http://www.cdc.gov/nchstp/hiv\\_aids/pubs/faq/faq5a.htm](http://www.cdc.gov/nchstp/hiv_aids/pubs/faq/faq5a.htm). Cancer rumors generally focus on allegedly carcinogenic products. One example is the unsupported fear of sodium lauryl sulfate, a common cosmetic ingredient. Another recent Internet hoax claims that anti-perspirants are the leading cause of breast cancer. See *Breast Defense* (visited Jan. 8, 2000) <http://www.snopes.com/toxins/breast.htm> (an Urban Legends web site debunking the rumor); see also *Natural Wellness: Deodor-lyte* (visited Jan. 8, 2000).

The transmission of information through rumor manifests a basic mistrust of official sources. Patricia Turner, a well-known folklorist, explains this sometimes misplaced faith in rumors, especially Internet hoaxes: “We trust technology more than the government. The Internet seems to be a sophisticated purveyor of information, so we think, ‘If it comes through expensive hardware, it must be so.’”<sup>16</sup> A related source of this mistrust is the tendency for rumors—and the threat they articulate—to have a particular resonance among certain subcultures in society.<sup>17</sup> “Until the threat which the subculture perceives to be inherent in wider culture ceases to be a motive, narratives which articulate and validate the threat will be believed and communicated without question.”<sup>18</sup> Due to their existence outside the mainstream, these marginalized subgroups are unlikely to believe the logical refutations of a rumor by the majority of society. Individuals spread rumors for a variety of reasons: because they find a story humorous, because they believe the rumor is true and want to be a good samaritan, because passing along information fosters a sense of self-importance. A person on the receiving end of a rumor may feel social pressure to reciprocate, either by spreading the rumor to additional people or by sharing a different ru-

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<http://www.naturalwellness.org/deodorlyte.htm>. The Deodor-lyte web site poses the following questions to consumers: “Did you know that if you develop breast cancer it probably will occur near an area closest to your underarm? Scientists can’t say for sure yet that deodorants cause breast cancer, but doesn’t this make you wonder?” The site urges consumers to “stop using these large commercial deodorants” and switch to Deodor-lyte instead.

<sup>16</sup>Patti Hartigan, *Unfounded Rumors can Prove Indestructible in Cyberspace*, BOSTON GLOBE, April 9, 1999, at A1.

<sup>17</sup>For example, Patricia Turner has focused on rumor culture among African-Americans. See generally *I HEARD IT THROUGH THE GRAPEVINE: RUMOR IN AFRICAN-AMERICAN CULTURE*, *supra* note 6. Social psychologist Fredrick Koenig, a professor at Tulane University, has noted a similar phenomenon. “[I]solated or less popular members of groups are often motivated to transmit attention-getting stories, and...religious fundamentalists are major repeaters of rumors.” Jay Workman, *Experts Say Bad Times Stir Rumors*, at 1B, available in 1987 WL 5025935.

<sup>18</sup>Boyes, *supra* note 9, at 76.

mor with the original narrator. “Transmitting a contemporary legend can be a ritual of solidarity, and contributes to the establishment of the relationship. . . . If knowledge or belief is power, then such communication provides power and reflects the consensus within the community. If one person narrates, the other is under pressure to do the same.”<sup>19</sup>

The spread of rumors has been historically difficult to combat, a difficulty that is multiplied by the ease with which stories can be transmitted over the Internet. The development of commercial web browsers like Netscape and Microsoft Explorer has permitted a tremendous expansion in Internet usage, particularly of the World Wide Web. The Internet had 147 million users in 1998, a number projected to increase to 320 million by the end of this year.<sup>20</sup> Internet technology is particularly well-suited to the spread of rumors and contemporary legends. “As more and more people are relying on the Internet for information and communication, the old-fashioned urban legend—once passed from neighbor to neighbor by word of mouth—has proliferated in cyberspace.”<sup>21</sup>

Internet rumors circulate by two primary methods: via forwarded e-mails passed along from person to person or on web sites or electronic bulletin boards accessed by individuals seeking information on a specific topic. E-mails forwarded by well-meaning friends or relatives are a common way of being exposed

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<sup>19</sup>FINE, *supra* note 7, at 24. *See also* Hartigan, *supra* note 16, at A1. “[T]hese stories can stroke egos; people who pass them on to friends and colleagues often feel as if they are doing a good deed.”

<sup>20</sup>Peter C. McMahon, *Securities Law and the Internet: Enforcement Issues*, PRACTICING LAW INSTITUTE, June-July 1999 at 270, available at WL 1127 PLI/Corp 265.

<sup>21</sup>Hartigan, *supra* note 16, at A1.



to an Internet hoax.<sup>22</sup> The Nerdherd web site criticizes this practice:

Since it is very easy to help someone when you don't have to sacrifice anything, and it takes only a bit of time to spam everyone in your address book, it is easy to mindlessly forward these chains, and with more people joining the Internet every day, there's [sic] endless new patsies to fall for the hoax and forward it to their friends, too, possibly even back to you!<sup>23</sup>

As annoying as forwarded e-mails may be, they are easily identifiable as rumors and can be evaluated as such by recipients. The use of web sites or electronic bulletin boards to spread rumors is more problematic, because these methods of transmission closely resemble legitimate information sources. A person who received an e-mail claiming sodium lauryl sulfate, an ingredient commonly found in shampoo and other cosmetic products, is a carcinogen, might try to verify the truth of that statement by entering the term "sodium lauryl sulfate" into an Internet search engine. The results of that search would range from legitimate web sites published by the American Cancer Society discrediting the rumor to more questionable web sites validating the story and promoting natural health products that do not contain sodium lauryl sulfate.<sup>24</sup>

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<sup>22</sup>In 1999, I received forwarded e-mails from friends relating to both the use of sodium lauryl sulfate in shampoo and the contamination of tampons with asbestos and dioxin.

<sup>23</sup>*Chain mail* (visited Jan. 8, 2000) <http://www.nerdherd.com/hoaxes/chainmail.html>.

<sup>24</sup>I ran this search on January 8, 2000 as part of my research for my paper. The results were decidedly mixed, ranging from web sites sponsored by the American Cancer Society, Ask Dr. Weil, and the Canadian Health Protection Branch (Canada's counterpart to the FDA) debunking the rumor to web sites sponsored by Neways, Young Living Essential Oils, and Cancer in the Bathroom implicitly confirming the rumor and offering sodium lauryl sulfate-free products. For specific citations, see the section on SLS, *infra*.

Similarly mixed results can occur for any Internet search, due to the self-regulated nature of the medium and the commercial nature of search engines.<sup>25</sup> No outside entity rates web sites on the basis of reliability and accuracy, and the order in which web sites appear is often commercially determined by a fee paid to the operator of a particular search engine. “The first ten hits you get on any search...have been paid for and [placement] is determined by how much they paid.”<sup>26</sup> Consumers are increasingly reliant on the Internet as a source of health information—last year, more than 22 million Americans used the Internet to seek medical information.<sup>27</sup> The ready availability of false or misleading health-related web sites—undifferentiated from legitimate health information—represents a legitimate cause for concern.

The dual methods of Internet transmission—rumors forwarded by e-mail and “verified” by or sometimes originating from dubious web sites—are self-reinforcing and extremely difficult to counteract. “The ease of transmission makes it nearly impossible to kill an Internet rumor, no matter how outrageous, defamatory, or potentially damaging.”<sup>28</sup> The following case studies illustrate the operation of Internet hoaxes, their potential for consumer exploitation, and the difficulty

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<sup>25</sup>Cf. Susan Okie, *FTC ‘Teaser Site’ Warns Against Web Quackery*, NEWARK STAR-LEDGER, Aug. 10, 1999, at 4, available at 1999 WL 2998743 (noting that a web search for “arthritis cure” produces a list of more than 10,000 web sites, some providing reliable and useful healthcare information and others operated by scam artists promoting miracle cures).

<sup>26</sup>George Lundberg, M.D., remarks at FDA symposium on *FDA and the Internet: Advertising and Promotion of Medical Products, Discussion Group 4 (Web site Links)* (Oct. 17, 1996) (transcript available at <http://www.fda.gov/opacom/morechoices/transcript1096/fdainet7.html> at \*18).

<sup>27</sup>Okie, *supra* note 25 at 4. Health concerns are the sixth most common reason people utilize the Internet, and the number of people seeking health information over the Internet is increasing by 70% a year. *Id.* Another report claims that 43% of adult Internet users are seeking health or medical information. See Kristen Green, *Marketing Health Care Products on the Internet: A Proposal for Updated Federal Regulations*, 24 AM. J. L. & MED. 365, 370 (1998).

<sup>28</sup>Hartigan, *supra* note 16, at A1.

faced by public and private actors in counteracting such rumors.

## II.

### Rumor in Action: Three Examples

The three Internet hoaxes cited below share several commonalities: each was widely circulated on the Internet during the last two years, each poses a potential threat of creating consumer confusion and harming the targeted product or producer, and each is commercially motivated. Professional folklorists and sociologists are generally skeptical of claims that rumors are originated or spread by competitors to cause deliberate economic harm,<sup>29</sup> but all three of the hoaxes discussed below can be plausibly linked to a corporate rival.

One important difference separates the rumors. Two are directed at products (shampoo and tampons) manufactured by a variety of companies, while one targets a specific corporation. This distinction is crucial, both in terms of available remedies and the incentive to pursue those remedies.

### **Toxic Tampons**

This e-mail, containing one utterly implausible claim (that tampons contain asbestos) and one exaggerated and misleading claim (the risk posed by

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<sup>29</sup> See FINE, *supra* note 7, at 143-144 (“I do not accept the unproven claim that these tales are usually tools of corporate espionage or conscious manipulations of public opinion by disgruntled consumers or employees.”); *see also* TURNER, *supra* note 6, at 165-166.

dioxin), began circulating the Internet during the 1998.<sup>30</sup> The rumor peaked in early December 1998, when the FDA Center for Women's Health was inundated with concerned phone calls from women who had received the e-mail.<sup>31</sup> Despite the recent pedigree of this particular hoax, rumors involving feminine hygiene products have a relatively long history and are considered a feminist subset of folklore.<sup>32</sup> While rumors about the safety of tampons are by no means novel, the recent hoax added a novel marketing ploy to hackneyed fears about product safety.

The rumor apparently originated from the web site of Bio Business International, the marketing firm for the "100% cotton, non-chlorine bleached tampons" marketed by Terra Femme.<sup>33</sup> Not coincidentally, Terra Femme is one of the two "manufacturers of a cotton alternative" mentioned in the e-mail. Consumers fearful of asbestos or dioxin in standard tampons can purchase their feminine hygiene products from Terra Femme, at the premium price of \$5.49 for a box of twenty (roughly two dollars more than Tampax, Kotex, and other industry leaders).<sup>34</sup> Unfortunately, the best available evidence indicates that women are getting no additional value for their money.

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<sup>30</sup> See *Asbestos in Tampons*, *supra* note 3.

<sup>31</sup> See "Toxic Tampon" *Internet Hoax Plagues FDA*, NONWOVENS INDUSTRY, Jan. 1, 1999, available at 1999 WL 13829370. During the same period, Procter & Gamble, the manufacturer of Tampax, was receiving up to 550 queries per month from women who had received or heard about the e-mail. See Michael Fumento, *Tampon Terrorism: New Technique in Marketing: Using the Web to Spread Lies about Your Competition*, *Forbes*, May 17, 1999, at 170.

<sup>32</sup> See FINE, *supra* note 7, at 9.

<sup>33</sup> See Fumento, *supra* note 31, at 170. Peter Mayberry, the director of government affairs for INDA (Association of the Nonwoven Fabric Industry), a trade association whose members include the major tampon manufacturers, declined to name the suspected perpetrator of the hoax, but described it as "a marketing ploy done very cleverly by the manufacturer of a competing product in a way—anonymous postings, chain letters—that very little recourse could be taken." Telephone interview (Jan. 27, 2000).

<sup>34</sup> *Supra* note 31 at 170. INDA contacted the FDA about the rumor in October 1998. Telephone interview with Peter Mayberry (Jan. 27, 2000).

No evidence supports the claim that tampons are adulterated with the addition of asbestos. The FDA, which regulates tampons as medical devices,<sup>35</sup> dismisses this claim on its official web site: “Before any tampon is marketed in the U.S., FDA reviews its design and materials. Asbestos is not an ingredient in any U.S. brand of tampon, nor is it associated with the fiber used in making tampons.”<sup>36</sup> The Urban Legends web site provides a common sense argument debunking the rumor: “[Asbestos] has been banned in the United States. No, it’s not being used in tampons. If the government won’t let you put it in a wall, it won’t let you put it in inside you either.”<sup>37</sup>

The dioxin claim is less far-fetched, but nonetheless misleading. Dioxins are a common environmental contaminant, and trace amounts can be found in virtually any product. To minimize the presence of dioxin, U.S. tampon manufacturers have adopted dioxin-free wood pulp purification and bleaching processes.<sup>38</sup> The FDA, which monitors dioxin levels as part of their oversight of tampon manufacturers, has concluded that: “State-of-the-art testing of tampons and tampon materials that can detect even trace amounts of dioxin has shown that dioxin levels are at or below the detectable limit. No risk to health would be expected from these trace amounts.”<sup>39</sup> More importantly, the pervasiveness of dioxin in the environment means that even “100% cotton, non-chlorine bleached tampons” are not dioxin-free.<sup>40</sup>

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<sup>35</sup> See 21 U.S.C.A. § 321(h).

<sup>36</sup> Center for Devices and Radiological Health, *Tampons and Asbestos, Dioxin, & Toxic Shock Syndrome* (visited Jan. 4, 2000) <http://www.fda.gov/cdrh/ocd/tamponsabs.html>.

<sup>37</sup> *Supra* note 3.

<sup>38</sup> See *Tampons and Asbestos, Dioxin, & Toxic Shock Syndrome*, *supra* note 36.

<sup>39</sup> *Id.*

<sup>40</sup> In tests conducted by Kimberly-Clark, a major U.S. manufacturer of tampons, Terra

Despite the implausibility of the claims, the “toxic tampon” e-mail struck a chord with women. In addition to the volume of phone calls received by the FDA, tampon manufacturers received a large number of concerned queries and angry complaints from women who had received the e-mail or otherwise heard about the rumor.<sup>41</sup> Attempts also were made to organize a tampon boycott.<sup>42</sup> The rumor’s economic impact, though difficult to quantify, was likely negligible,<sup>43</sup> but the effect on consumer good will and corporate reputations was likely more significant.

The response to the rumor, undertaken by FDA, INDA, and various tampon manufacturers, was an informational counterattack focused on discrediting the “toxic tampon” message. In response to industry concerns, the FDA published an official denial of the rumor on its web site and in *FDA Consumer* magazine.<sup>44</sup>

Correct information was also provided by the Center for Women’s Health Hotline. Tampon manufacturers, acting on their own initiative, also took affirmative

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Femme tampons were found to be contaminated with “mid-level” trace amounts of dioxin. See Fumento, *supra* note 31, at 170.

<sup>41</sup> See *supra* note 31.

<sup>42</sup> Brigitte O’Donoghue, *Tampon boycott switches hands* (visited Jan. 20, 2000) <http://lists.essential.org/1996/dioxin-1/msg00080.html>. This message, a posting on a threaded discussion about dioxin, notes that responsibility for organizing the “playtex campaign” has shifted to another individual, due to Ms. O’Donoghue’s fears of being sued. “I was told that it was possible to be hit with a slapsuit [sic] for the campaigns, and since I was doing it as an individual rather than a group, I could potentially get myself and my family in trouble. I’m not sure this is true. . .but to play it safe I am only minimally [sic] going to be involved.” Her concerns highlight the First Amendment implications of combatting rumor campaigns through legal action, rather than relying on counter-information alone.

<sup>43</sup> The diversion of women from tampon brands commonly found in the local drugstore to brands like Terra Femme was likely tiny, due to the significantly higher cost and difficulty in acquiring the latter product (Terra Femme is only available in a handful of specialty stores, meaning that consumers who want that particular brand generally must order directly from the company and pay shipping and handling costs). See Fumento, *supra* note 31. While some women may have been motivated to switch from tampons to pads because of the rumor, companies typically manufacture both products, minimizing the economic impact. Unfortunately, no statistics quantifying either the number of women motivated to change their buying patterns or the economic impact of that change on tampon manufacturers are available.

<sup>44</sup> See *supra* note 34 (posted July 23, 1999); see also *Internet Rumors About Tampons Refuted*, FDA CONSUMER, March 1, 1999, at 7, available at 1999 WL 11281964.

steps to combat the rumor. In addition to Kimberly-Clark's testing of Terra Femme tampons, they and Procter & Gamble created web sites responding to the rumor that directed concerned consumers to the FDA's official web site.<sup>45</sup> INDA, in an article addressing the hoax, took the further step of urging recipients of the message to inform the sender of the facts and to contact INDA if they had information about the original source of the rumor.<sup>46</sup>

Cooperation between the FDA and industry was sufficient to quell the rumor. In

mid-February 1999, the FDA (acting on a tip from INDA), contacted the operators of a web site identified as one source of the rumor, resulting in the removal of the web site and publication of a retraction.<sup>47</sup>

### **Carcinogenic Shampoo**

In the summer of 1998, an anonymous e-mail claiming that a common cosmetic

ingredient, sodium laureth sulfate (SLS), was a carcinogen began circulating the Internet. The Urban Legends web site dismisses the e-mail as "[y]et another product scare in the form of an endlessly-forwarded anonymous e-mail message

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<sup>45</sup>See, e.g. *Misleading Rumors About Tampons* (visited Jan. 4, 2000) <http://bodymatters.com/questions/questions4.html>. The web site, featuring frequently asked questions and responses from Elaine Plummer, a registered nurse and P&G spokesperson, answers questions about asbestos, dioxin, and other tampon concerns and refers visitors via hyperlink to the FDA web site debunking the rumor.

<sup>46</sup>"[I]f you receive an e-mail about asbestos in tampons, or see a posting on an electronic message board, note the address of the person who forwarded the message and let them know that the rumor is false. Or if you have information that can identify sources of false Internet messages about tampons, please forward it, via e-mail, to..." *Supra* note 29.

<sup>47</sup>Peter Mayberry, *FDA Proposes New Tampon Category*, Nonwovens Industry, March 1, 1999, available at 1999 WL 13829480.

[that] hit the Internet in mid-1998.”<sup>48</sup> Despite that breezy description, the SLS e-mail actually represents a marketing ploy even more subtle than that undertaken by the perpetrators of the toxic tampon hoax.

One variant of the e-mail lists several shampoos, including “Vo5, Palmolive, Paul Mitchell, the new Hemp shampoo, etc.” that contain SLS and one shampoo—Vidal Sassoon—that does not.<sup>49</sup> However, the maker of Vidal Sassoon, consumer products giant Procter & Gamble, has not been linked in any way to the dissemination of this hoax. Several monitors of Internet hoaxes have identified a handful of companies selling all-natural cosmetic products as the source of the rumor. “In trying to track down the source of concern about SLS, I found repeated instances of unsubstantiated, alarmist claims coming mostly from the purveyors of natural shampoos.”<sup>50</sup> The producers of all-natural shampoos and cosmetic products who are the likely originators and intended beneficiaries of the hoax are not named in the e-mail message—but their web sites confront any concerned consumer who goes to the Web and searches for more information on the safety of SLS.<sup>51</sup>

Consumers trying to substantiate or disprove the truth of SLS claims through

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<sup>48</sup> *Supra* note 4.

<sup>49</sup> *Id.*

<sup>50</sup> *Ask Dr. Weil: Is Shampoo Hazardous to Health?* (visited Jan. 10, 2000) <http://www.pathfinder.com/drweil/qa.answer/0,3189,1499,00.html>. See also *Shampoo-poo*, *supra* note 4 (“[S]ince the ‘SLS is dangerous’ message has been widely disseminated by sellers of ‘alternative’ or ‘all natural’ products who tout their wares don’t contain SLS, perhaps someone in the ‘natural products’ business deliberately created the message as a way of drumming up business.”).

<sup>51</sup> The *Washington Post* describes the experience of a typical consumer. “The bulk of what DeBenedittis found online was almost identically worded warnings in newsgroup messages and e-mails with headers like: ‘SHAMPOO ALERT! MUST READ!’ Hundreds of Web sites echoed the same alarm: ‘Beware! Potential CANCER causing ingredients in your bathroom!’” Don Oldenburg, *Consummate Consumer: Rhetoric or Reality?*, WASH. POST., Oct. 21, 1998, at D6.



their own Internet research will need to wade through a significant amount of misleading chaff to find accurate information on the safety of SLS. “[T]he majority of URLs returned in a standard Web search on the keywords ‘sodium laureth sulfate’ all point to versions of the same propaganda... Interestingly, all these Web sites are maintained by ‘independent distributors’ for various multi-level marketing companies hawking natural personal care products.”<sup>52</sup> Examples include web sites maintained by Young Living Essential Oils (“All Young Living products are free from questionable synthetic ingredients such as sodium lauryl sulfate”);<sup>53</sup> Neways (“Avoid these HARMFUL INGREDIENTS, commonly found in personal care products”);<sup>54</sup> and an individual named Randy warning of “Cancer in the Bathroom” (“The greatest concern of many scientists today is centered around Sodium Lauryl Sulfate (SLS)... For more FREE information about harmful ingredients as well as SAFE PRODUCTS that you and your family can use, e-mail...”).<sup>55</sup>

In addition to helping shield the originators of the hoax from liability by avoiding a direct connection between the perpetrators of the false rumor and the sellers of the consequently attractive SLS-free product, potentially significant legal implications are attached to the methods in which consumers receive misleading product information. A consumer who receives misleading information through his or her own initiative (i.e. conducting a web search) may be less

<sup>52</sup>American Cancer Society, *Debunking the Myth* (visited Jan. 10, 2000) [http://www2.cancer.../dsp\\_StoryIndex.cfm?sc=004&fn=004\\_09231998\\_1&CFID=1261330&CFTOKEN=8321326](http://www2.cancer.../dsp_StoryIndex.cfm?sc=004&fn=004_09231998_1&CFID=1261330&CFTOKEN=8321326) (quoting David Emery).

<sup>53</sup><http://www.herbalplant.com/index.html> (visited Jan. 10, 2000).

<sup>54</sup><http://www.indneways.com/avoiding.htm> (visited Jan. 4, 2000).

<sup>55</sup><http://www.shorejournal.com/9707/ras0713a.html> (visited Jan. 8, 2000).

protected than a consumer who is misled by information foisted upon him or her (in the form of an unwanted forwarded or spam e-mail).

A second clever element of the SLS e-mail is that it disparages an ingredient and not a product. In targeting a common cosmetic ingredient, used by numerous producers in multiple products, the rumor creates a collective action problem. Companies, particularly those whose products are not named in the e-mail, may not only lack sufficient incentive to rebut the rumor, but may also be reluctant to draw attention to the fact that their product contains an alleged carcinogen.<sup>56</sup> While laws protect the disparagement of specific products, no legal protection is afforded to the chemical ingredients that may be present in those products.<sup>57</sup>

A third interesting feature is the exploitation of scientific uncertainty to shield rumormongers from liability. The Neways web site deserves special mention for its adroit web construction. The first page of the web site is a legitimate news release detailing the dangers of diethanolamine (DEA), a cosmetic ingredient that poses a questionable but nonetheless scientifically arguable cancer risk.<sup>58</sup>

At the end of the press release, visitors to the web site may click on a hyperlink listing other harmful ingredients to avoid.<sup>59</sup> The linked web site provides this

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<sup>56</sup>For example, the Colgate web site contains no reference to the SLS rumor. See *Colgate-Palmolive* (visited Jan. 28, 2000) <http://www.colgate.com>.

<sup>57</sup>See Michael Heylin, *A Chemical Libel Law*, CHEMICAL & ENGINEERING NEWS, Feb. 9, 1998 (noting that no equivalent to “veggie libel laws” protects chemicals from disparagement).

<sup>58</sup>*To Business, Medical and National Editors* (visited Jan. 4, 2000) <http://www.indneways.com/avoiding.htm>. Dr. Weil notes the distinction between rumors about DEA, which are supported by at least one scientific study, and the absolutely unfounded rumors surrounding SLS. See *Ask Dr. Weil*, *supra* note 50. Dr. Samuel Epstein, a frequent critic of DEA who is cited in the Neways press release, does not extend his criticism to SLS. “I am unaware of any evidence that sodium lauryl sulfate is carcinogenic.” Oldenburg, *supra* note 51, at D6.

<sup>59</sup>The exact wording is found in the parenthetical text accompanying footnote 54.

description of SLS:

Potentially, SLS is perhaps the most harmful ingredient in personal-care products. SLS is used in testing-labs as the standard skin irritant to compare the healing properties of other ingredients. Industrial uses of SLS include: garage floor cleaners, engine degreasers and car wash soaps. Studies show its danger potential to be great, when used in personal care products. Research has shown that SLS and SLES may cause potentially carcinogenic nitrates and dioxins to form in the bottles of shampoos and cleansers by reacting with commonly used ingredients found in many products. Large amounts of nitrates may enter the blood system from just one shampooing.<sup>60</sup>

The Neways web site mixes some truth—the use of SLS in high concentrations as an industrial cleaner—with numerous qualifications and the implausible claim that the reaction of SLS with other cosmetic ingredients can cause cancer. Neways president Tom Mower draws a fine distinction between claiming SLS is itself is a carcinogen and that it can react with other compounds to pose a risk of cancer. “While neither [SLS or SLES] is carcinogenic, they both can react with compounds and form compounds that are carcinogenic.”<sup>61</sup> Mower claims that Neways can support this contention with scientific evidence, but backs away from substantiating the Internet rumors. “[The Internet warnings are] kind of like word of mouth and it gets jumbled up. It is probably a little

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<sup>60</sup>*Harmful Ingredients to Avoid Which May be Found in Your Personal Care Products* (visited Jan. 10, 2000) <http://www.indneways.com/harmfulingred.htm>.

<sup>61</sup>Oldenburg, *supra* note 51, at D6.

too scientific for the Internet.”<sup>62</sup>

No reliable source supports the contention that SLS is carcinogenic. The American Cancer Society, which describes SLS as a “cosmetic detergent,” authoritatively denies that SLS is a cancer-causing agent. “Contrary to popular rumors on the Internet, Sodium Lauryl Sulfate (SLS) and Sodium Laureth Sulfate (SLES) do not cause cancer. . . . A search of recognized medical journals yielded no published articles relating this substance to cancer in humans.”<sup>63</sup> The Canadian Health Protection Branch, the Canadian counterpart of the FDA, has issued an official statement on its web site discrediting the Internet rumor. “[T]his **e-mail warning is a hoax**. . . Health Canada has looked into the matter and has found no scientific evidence to suggest that SLS causes cancer.”<sup>64</sup> Neway’s claim that SLS can become carcinogenic through interaction with other cosmetic ingredients is equally discredited. John Bailey, director of the FDA’s Office of Cosmetics and Colors, states, “We cannot find anything that would indicate under conditions of use in cosmetics and over-the-counter drugs that the use of sodium lauryl sulfate is harmful as a cosmetic ingredient when the cosmetic is properly formulated.”<sup>65</sup>

The SLS e-mail possesses at least enough superficial plausibility to create consternation among consumers. In the second half of 1998, when the rumor was

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<sup>62</sup> *Id.*

<sup>63</sup> *Supra* note 52.

<sup>64</sup> Health Canada, *Sodium Laureth Sulphate (SLS) – Internet Hoax* (visited Jan. 4, 2000) <http://www.hc-sc.gc.ca/ehp/ehd/psb/cosmetics/sls.htm> (emphasis in original). One version of the SLS e-mail claims that originator of the e-mail is Michelle Hailey, an employee of the University of Pennsylvania Health System’s Office of Legal Affairs. Health Canada contacted the organization and found that they had not authored the e-mail and did not endorse any link between SLS and cancer. *Id.*

<sup>65</sup> Oldenburg, *supra* note 51 at D6.

at its peak, the FDA received more than 100 inquiries from consumers.<sup>66</sup> More evidence of consumer concern can be found in threaded discussions devoted to the subject—a mix of e-mails seeking information, testifying to the truth of the rumor and promoting SLS-free products, or discrediting the idea of SLS as a carcinogen.<sup>67</sup> One recurrent theme in the on-line discussion is the FDA’s role in regulating SLS, as well as a desire for the agency to play a role in addressing the rumors surrounding the ingredient. “Looking over the NET, it looks like the ‘NEWAY’ company has come up [with] a brilliant idea to sell millions of dollars of theirs, and any other ‘la natural’ products to the accepting public. . . Is there a scientist on board? Someone without a vested interest in these companies! How about the FDA, anyone home?”<sup>68</sup>

The self-regulating nature of the cosmetics industry diminishes the incentive for the FDA to engage in a full-fledged battle against Internet rumors directed at cosmetic ingredients and products. In contrast to its efforts in combating the toxic tampon hoax, the FDA played a relatively passive role in debunking the SLS rumor. The agency released no official statement denying that SLS was a carcinogen; in fact, the industry web site responding to the rumor points consumers to the Canadian Health Protection Branch rather than the FDA.<sup>69</sup>

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<sup>66</sup> *Id.*

<sup>67</sup> See, e.g. Topic #56 – Sodium Lauryl Sulfate (visited Jan. 10, 2000) [http://www.hairsite.com/\\_disc56/00000001.htm](http://www.hairsite.com/_disc56/00000001.htm).

<sup>68</sup> *Id.* (Message #16). See also Message #1 (“I would like to confirm a message I received over the Internet which states that SODIUM LAURETH SULFATE (SLS) causes cancer. If this is true, how come the FDA has not done anything about it yet?”); Message #23 (“Do not get put out by every email you get warning you of something. The FDA is NOT that corrupt.”).

<sup>69</sup> See Cosmetic, Toiletry, and Fragrance Association, *Internet-spread Rumors About Sodium Lauryl Sulfate (SLS) and Sodium Laureth Sulfate (SLES) are False and Unsubstantiated* (visited Jan. 4, 2000) <http://www.cfta.org/cftapublic/Pr198-22.htm>.

Cosmetics and cosmetic ingredients, while under the FDA's jurisdiction,<sup>70</sup> are much less heavily regulated than medical devices such as tampons.<sup>71</sup> Accordingly, the FDA has a less vested interest in defending cosmetic ingredients tested by the cosmetics industry than in defending tampons subject to FDA pre-market approval and inspection.

Due to the self-regulated nature of the cosmetics industry and the collective action problem faced by the multiple producers of cosmetics containing SLS, the burden of countering the SLS rumor has fallen largely on the Cosmetic, Toiletry, and Fragrance Association (CTFA), the umbrella group representing cosmetics producers. In addition to its response to the SLS rumor, CTFA has issued press releases in the past year debunking rumors that antiperspirants are linked to breast cancer and that waterproof sunscreen can cause blindness.<sup>72</sup> CTFA's response statement to the SLS rumor points to a 1983 safety review conducted by the Cosmetic Ingredient Review (CIR) panel; however, the relationship between CTFA and CIR makes that result slightly less compelling than an FDA or independent clinical study.<sup>73</sup>

### **Satanic Conglomerates**

Unlike the tampon and shampoo rumors, which have very recent antecedents, the

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<sup>70</sup> See 21 U.S.C.A. §361-§363.

<sup>71</sup> See U.S. Food and Drug Administration, *Clearing Up Cosmetic Confusion* (visited Jan. 17, 2000) <http://vm.cfsan.fda.gov/~dms/fdconfus.html>.

<sup>72</sup> A full list of press releases is available at [www.cfta.org](http://www.cfta.org).

<sup>73</sup> CTFA emphasizes the independent and unbiased nature of CIR's findings while acknowledging that the panel is funded by CTFA. See *supra* note 69.

rumor linking Procter & Gamble to the Church of Satan has been in circulation for more than twenty years. The current rumor blends two distinct stories: one claiming that Ray Kroc, the founder of McDonald's, admitted he was a Satanist during a 1977 appearance on the Phil Donahue Show and one claiming that Procter & Gamble's trademark (a moon and thirteen stars) indicated an affiliation of Reverend Sun Myung Moon's Unification Church.<sup>74</sup> The two rumors combined in 1981 to form a modern version of the Faustian legend that has bedeviled Procter & Gamble ever since.

The Satanism story has enjoyed surprising longevity for a rumor with absolutely no factual foundation. Whereas Ray Kroc had actually appeared on the Donahue show, giving some minimal plausibility to the original rumor involving McDonald's, no Procter & Gamble executive has ever appeared on any talk show, let alone to discuss his or her devil worship.<sup>75</sup> Durk I. Jager, the current president of Procter & Gamble, vehemently denies any affiliation with the Church of Satan on the company's website.<sup>76</sup> Procter & Gamble also makes available letters from various religious leaders attesting to the falsity of the rumor.<sup>77</sup> Nonetheless, the rumor continues to circulate, by methods that increasingly include e-mail.

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<sup>74</sup>See FINE, *supra* note 7, at 178-179.

<sup>75</sup>Procter & Gamble has distributed letters from the producers of various talk shows—Donahue, The Jenny Jones Show, and Sally (hosted by Sally Jesse Raphael)—confirming that no representative from the company has ever made an appearance on their respective shows. PROCTER & GAMBLE, PROCTER & GAMBLE: SYMBOL OF QUALITY (1998).

<sup>76</sup>Procter & Gamble, *Comments from Our Chief Executive* (visited Jan. 8, 2000) <http://www.yourfuture.pg.com/rumor/ceo.html>.

<sup>77</sup>See PROCTER & GAMBLE: SYMBOL OF QUALITY, *supra* note 75 (reprinting letters from Rev. Daniel E. Pilarczyk, the Archbishop of Cincinnati; Jerry Falwell, televangelist and chancellor of Liberty University; Paige Patterson, president of the Southern Baptist Convention; the Rt. Rev. Herbert Thompson, Jr., the Episcopal Bishop of Southern Ohio, and Billy Graham).

The Satanism rumor has been spread over the Internet only during the past few years. The rumor crops up in cycles—during 1995, it was being passed by church bulletins, Xeroxlore,<sup>78</sup> faxes, and e-mail. A Procter & Gamble spokesperson noted college students were especially active in spreading the rumor via the Internet and that the company had complained to university officials about the misuse of campus computer networks.<sup>79</sup> The most recent litigation related to the rumor alleges that it was spread through Amway’s voicemail network.<sup>80</sup>

Procter & Gamble is convinced that Amway, a company that utilizes a multi-level distribution plan and door-to-door sales to sell the same types of consumer goods produced by Procter & Gamble, is the driving force behind the rumor. “P&G alleges that since the early 1980s Amway and its distributors have circulated false statements that P&G is associated with Satanism and that profits from the sale of P&G products are contributed to the ‘Church of Satan.’”<sup>81</sup> Procter & Gamble has sued Amway or its distributors over the Satanism rumor in 1982, 1983, 1986, 1990, 1995, and 1999, with the dates of the lawsuits roughly tracking the cycles of the rumor.<sup>82</sup> While both of Procter & Gamble’s 1999 lawsuits against Amway were dismissed,<sup>83</sup> the earlier cases resulted

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<sup>78</sup> “Xeroxlore” is a term coined by folklorists to describe the spread of rumors through photocopies—a medium that has been largely supplanted by the Internet. See FINE, *supra* note 7 at 13.

<sup>79</sup> See *Procter & Gamble Rumor Resurfaces*, WEEKLY SUMMARY, March 31, 1995 at 1, reprinted in PROCTER & GAMBLE: SYMBOL OF QUALITY, *supra* note 75.

<sup>80</sup> See *Procter & Gamble v. Haugen*, 947 F.Supp. 1551, 1553 (D.Utah 1996).

<sup>81</sup> *Procter & Gamble v. Amway Corporation*, 1999 WL 1116836 at \*1 (S.D.Tex.).

<sup>82</sup> *Id.* at \*5.

<sup>83</sup> See *P&G Lawsuit Dismissed* (visited Jan. 10, 2000) [http://www.desnews.com/cgi-bin/libstory\\_reg?dn99&9905170483](http://www.desnews.com/cgi-bin/libstory_reg?dn99&9905170483). Procter & Gamble’s claims are discussed in detail in the section discussing private remedies, *infra*.



in favorable settlements.<sup>84</sup>

The Satanism rumor, because it is directed at a specific company and not a product, is outside the purview of state or federal regulators. Only private remedies are available in this case, but Procter & Gamble—unlike the multiple companies impacted by the product rumors—has clear impetus to take action. In addition to filing multiple lawsuits against Amway representatives and other individuals engaged in spreading the rumor, the company has also embarked on an extensive public relations campaign to reassure consumers. A section of the company's website is devoted to debunking the rumor, Procter & Gamble has established a hotline for concerned consumers, and an informational packet is available on request.<sup>85</sup> This extensive corporate outreach is necessitated by the volume of consumer inquiries—the company has received more than 200,000 inquiries about its purported link to Satan.<sup>86</sup> The economic impact of the rumor—and its accompanying exhortation to boycott Procter & Gamble products—is difficult to assess,<sup>87</sup> but the damage to the company's reputation is unquestionable. “[The rumor] hurts our Company and the fine people who work here, and raises unnecessary questions in the minds of you,

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<sup>84</sup>For example, a federal court in Topeka, Kansas ordered two Amway distributors to pay Procter & Gamble \$75,000 and permanently enjoined the couple from publishing or distributing any false statements linking the company to Satanism. See Robert A. Cronkleton, *Couple Must Pay for Rumors About Procter & Gamble*, KANSAS CITY STAR, March 29, 1999, at A12, available at 1991 WL 3763799.

<sup>85</sup>See *supra* notes 75 and 76.

<sup>86</sup>David Emery, *Sympathy for the Devil* (visited Jan. 8, 2000) <http://urbanlegends.about.com/culture/urbanlegends/library/weekly/aa080497.htm>.

<sup>87</sup>Estimates range from zero economic harm to a significant global impact. Compare FINE, *supra* note 7, at 179 (Procter & Gamble sales have not declined as a result of the rumor) to Procter & Gamble's contention: “This involves our company's reputation and loss of business. We know consumers worldwide have been diverted from buying our products.” Emery, *supra* note 86.

our loyal consumers.”<sup>88</sup>

### III.

#### Potential Public and Private Responses to Consumer Rumors

While the economic harm of Internet hoaxes may be difficult to quantify,  
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<sup>88</sup> *Supra* note 76.

case studies illustrate the damage such rumors can inflict on a product's or corporation's reputation, as well as the negative impact on consumer confidence. The likelihood that injury will result from the unrestricted circulation of false consumer rumors over the Internet should serve as a stimulus for the government to take action. While companies like Procter & Gamble have every incentive to defend their reputation, collective action problems frequently hinder an effective response in cases where there are multiple manufacturers of a product or ingredient targeted by an Internet hoax. Moreover, even in cases where companies are motivated to take action to defend their reputation, a rebuttal from an independent source—particularly a respected agency like the FDA—will likely carry more weight with consumers.<sup>89</sup> The FDA and FTC are the two federal agencies with the greatest interest in combating consumer rumors. Internet rumors concern the FDA because the bulk of maligned products can be classified as food, drugs, medical devices or cosmetics—all of which are regulated by the agency.<sup>90</sup> Such rumors are analogous to false or disparaging advertising and frequently are spread by business rivals, bringing them to the attention of the FTC. While some overlap exists in the agencies' jurisdiction, the FDA regulates advertising of prescription drugs and restricted medical devices, while the FTC has responsibility for over-the-counter drugs, cosmetics, and food.<sup>91</sup>

The ability to identify the parties responsible for an Internet hoax is a necessary prerequisite to the exercise of either government enforcement or private legal remedies. The anonymity of the Internet, as well as the shadowy nature

<sup>89</sup>A 1999 survey conducted as part of Vice-President Gore's National Partnership for Reinventing Government indicated that the FDA enjoys a high level of consumer confidence. See M2 Presswire, Dec. 15, 1999, available at 1999 WL 24374301; see also Peter Barton Hutt & Richard A. Merrill, *Food and Drug Law* 18-19 (2nd ed. 1991) (repeated surveys show that the FDA is one of the federal agencies in which citizens have the greatest confidence). But see Turner, *supra* note 4, at 140. During the mid-1980s, a widely-spread rumor in the African-American community claimed that Church's Chicken was owned by the Ku Klux Klan, who were adding an ingredient to the chicken that made black men infertile. A California congressman arranged to have the FDA test the chicken, and the congressman and officials from the fast food chain held a press conference to announce that the agency's testing had revealed no evidence that the chicken had been adulterated. Nonetheless, many remained convinced of the truth of the rumor and were suspicious that the Klan had "fixed things up with the FDA."

<sup>90</sup>The FDA's jurisdiction encompasses roughly 25 percent of the American economy. Peter B. Hutt, classroom lecture at Harvard Law School (Jan. 3, 2000).

<sup>91</sup>See U.S. Food and Drug Administration, *FDA and the Internet: Advertising and Promotion of Medical Products*, Remarks (Oct. 16, 1996) (transcript available at <http://www.fda.gov/opacom/morechoices/transcript1096/fdainet1.html>).

of rumors, make this a difficult but not impossible task. With most consumer rumors, the web sites set up to reinforce an e-mail rumor and promote an alternative product will be easy to find—because the site needs to be readily accessible to consumers in order for the hoax to be profitable.<sup>92</sup> Tracing the original source of an e-mail rumor is technologically possible, given the unique nature of IP addresses on the Internet.<sup>93</sup> This method is not fool-proof, due the existence of e-mail forwarding services, anonymous remailers, and other technological dodges,<sup>94</sup> but agencies have enjoyed a high degree of success.<sup>95</sup> The task faced in tracking down the originator of a consumer rumor is slightly easier, since in most cases there will be an obvious beneficiary of the rumor, giving agencies a logical starting point in their investigation. If an agency elects to use its resources to discover the source of an Internet hoax, it will likely be successful in the attempt, enabling more robust enforcement measures.

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<sup>92</sup>Companies will likely pay to ensure a prominent place in search engine results, as with the SLS scam. *See supra* notes 26, 51.

<sup>93</sup>All computers used to send, route or receive a message have a distinct, 32-bit numeric Internet Protocol (IP) address. “As a result, even when an individual logs onto a message board under an alias, that alias is traceable.” McMahon, *supra* note 20, at 272-273. In the PairGain case, SEC regulators were able to trace messages posted on Internet bulletin boards back to the perpetrator of the hoax. The SEC did utilize its subpoena power to gain access to records of various on-line service providers, a power that the FDA currently lacks. *Id.* at 289.

<sup>94</sup>*Id.* at 289. Of course, it can be equally challenging to discover the source of a rumor circulated through less high-tech means. Procter & Gamble hired private detectives to find the source of the Satanism rumor during the 1980s. *See Procter & Gamble Says Satan Suit is Serious*, SAN FRANCISCO CHRONICLE, Aug. 9, 1986, at 3, available at 1986 WL 3753452.

<sup>95</sup>Lee Peeler, Associate Director for the Division of Advertising Practices at the FTC, claimed a high rate of success for his agency. “Enforcement agencies have developed some techniques...we would be happy to talk to the FDA about it. But I guess for anybody out there in the room that is really interested in it, we have been able to find everybody.” *FDA and the Internet: Advertising and Promotion of Medical Products (General Regulatory Issues)* (Oct. 16, 1996) (transcript available at <http://www.fda.gov/opacom/morechoices/transcript1096/fdainet6.html>).

## Food and Drug Administration (FDA)

The irony of the FDA's questionable authority to redress Internet hoaxes is that the agency would have undoubtedly have the jurisdiction to act if the rumors were true. The FDA could certainly subject the makers of tampons adulterated with asbestos or the producers of a carcinogenic cosmetic ingredient to the full force of its regulatory power: the products would be recalled or perhaps seized and civil or criminal penalties would be likely be levied against the manufacturers. However, because the rumors are false, the agency's ability to regulate the perpetrators of Internet hoaxes is strained, fostering a cautious and perhaps reluctant regulatory approach. Consumers are physically injured only if the rumors are true, but the undermining of consumer confidence in trusted products (and by extension, the FDA's regulation of those products), represents an independent harm.

To date, the FDA has taken the attitude that current regulations are sufficient to address Internet issues. In October 1996, the agency hosted a conference focused on the Internet, aimed at providing the FDA with information that would assist them in promulgating Internet regulations.<sup>96</sup> The FDA has since

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<sup>96</sup>See U.S. Food and Drug Administration, *FDA and the Internet: Advertising and Promotion of Medical Products, Contents* (Oct. 16-17, 1996) (transcript available at <http://www.fda.gov/opacom/morechoices/transcript1096/fdainet.html>). The table of contents lists conference participants. Bill Schultz, Deputy Commissioner of Policy at the FDA, emphasized the information-gathering nature of the conference. "...[T]he Agency is not here today to answer any questions about either the law or about its plans. We are here much more to listen..." Remarks at FDA symposium on *FDA and the Internet: Advertising and Promotion of Medical Products, Discussion Group 4 (Opening Remarks)* (Oct. 16, 1996) (transcript available at <http://www.fda.gov/opacom/morechoices/transcript1096/fdainet1.html> at \*2).

decided to set aside its effort to formulate Internet-specific regulations, and will instead “look at [Internet] issues on a case-by-case basis and...re-evaluate the need for regulations in the future.”<sup>97</sup> FDA Commissioner Jane Henney emphasizes that specific Internet guidance, though abandoned for the time being, is not “off the table.”<sup>98</sup>

For the time being, the FDA is monitoring the Internet and relying on its existing statutory and regulatory authority to address problems. Henney summarizes the agency’s current approach:

We’re continuing to work with our federal partners on these issues and are doing our own screening of Internet sites. When we see things that have civil or criminal implications, we’re working on those cases. I believe the Internet is a means of communications that in many ways is no different than what we see in other formats, and so we are pursuing issues in this area.<sup>99</sup>

The FDA’s efforts to regulate the Internet have included both traditional enforcement actions and a campaign to educate consumers. The FDA has sent warning letters to the operators of web sites whose on-line promotional material exceeded permissible regulatory bounds.<sup>100</sup> The FDA has also pursued wire

<sup>97</sup>Melissa Moncavage, Division of Drug Marketing, Advertising & Communications Public Health Analyst, *quoted in FDA Internet Enforcement Without Guidance May Create ‘Incongruity,’* THE PINK SHEET, Nov. 8, 1999, *available at* 1999 WL 8677162.

<sup>98</sup>Jill Weschler, *A Conversation with FDA Commissioner Jane Henney*, Pharmaceutical Executive, Dec. 1, 1999, *available at* 1999 WL 11913987.

<sup>99</sup>*Id.*

<sup>100</sup>*See* Green, *supra* note 27, at 373-374. As of 1998, the FDA had sent warning letters to VidaMed, Inc., U.S. Medical Products, Inc., Papnet, and others. The violations involved performance claims or promoting an unapproved use of an FDA-approved product, not the sort of blatant consumer misinformation found in e-mail hoaxes. *Id.* at 374.

fraud charges against an individual selling unapproved HIV home testing kits over the Internet in its first-ever prosecution based on misuse of the Internet.<sup>101</sup> Recently, the proliferation of Internet pharmacies has sparked proposals to increase the agency's on-line oversight, including an increased budget for Internet enforcement and granting of subpoena power to the FDA.<sup>102</sup> This proposal, while specific to the regulation of Internet pharmacies, could provide a springboard for enhanced enforcement capabilities in all aspects of the FDA's on-line jurisdiction.

The FDA has also taken steps to educate consumers to be wary about the credibility of on-line information, publishing articles on assessing the validity of web sites and information posted on electronic bulletin board and in chat rooms. "While regulatory agencies try to devise ways of ensuring that accurate and well-balanced health and medical information is presented on the Internet, consumers will have to use a lot more discretion in evaluating what they see."<sup>103</sup> The FDA has enlisted consumers to assist the agency in identifying "problem" web sites, which its Office of Regulatory Affairs will then investigate.<sup>104</sup> Finally, at least in the case of the toxic tampons rumor, the FDA exercised its statutory power of publicity.<sup>105</sup> That rebuttal was confined to the factual misstatements

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<sup>101</sup>Paula Kurtzweil, *Internet Sales of Bogus HIV Test Kits Result in First-of-Kind Wire Fraud Conviction*, FDA CONSUMER, July-August 1999, available at <http://www.fda.gov/oc/buyonline/fdacir.html>.

<sup>102</sup>Naftali Bendavid, *Plan to Regulate Over-the-Web Drug Sales Draws Fire*, CHICAGO TRIBUNE, Dec. 29, 1999, available at 1999 WL; see also *Drugs on the Internet*, BOSTON GLOBE, Jan. 10, 2000 at A16.

<sup>103</sup>U.S. Food and Drug Administration, *Health Information On-Line*, FDA CONSUMER, Jan. 1998.

<sup>104</sup>See *FDA Web Site*, THE ROSE SHEET, Jan. 3, 2000, available at 2000 WL 7684431.

<sup>105</sup>See 21 U.S.C.A. §375(b): "The Secretary may also cause to be disseminated information regarding food, drugs, devices or cosmetics in situations involving, in the opinion of the

contained in the rumor, but the agency could presumably utilize its power of publicity not only to debunk a rumor but also to chastise those responsible for concocting the story—presuming the agency was able to ascertain who those parties were.

In addressing the toxin tampon hoax, the FDA was credited with taking rapid action to halt the spread of consumer misinformation, but was handicapped in its power to track down and punish the originators of the hoax:

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The FDA did an excellent job of getting the truth out and informing women that the rumor was unfounded and shouldn't be taken seriously. . . On a scale of one to ten, I'd put their efforts at an eight or nine. The only reason they're not a ten is that their hands are tied in a lot of ways. . . if they had had the resources and ability to go after the people originating the rumor, that would have been a ten.”<sup>106</sup>

**The FDA certainly has the potential to engage in more aggressive enforcement if it chooses to do so.<sup>107</sup> While existing advertising regu-**

Secretary, imminent danger to health *or gross deception to the consumer.*” (emphasis added). Of course, the statute contemplates the FDA releasing negative information about a regulated product, rather than defending a product in the face of Internet rumors as to its safety.

<sup>106</sup>Telephone interview with Peter Mayberry (Jan. 27, 2000).

<sup>107</sup>The FDA enjoys absolute discretion not to undertake enforcement actions. See *Heckler v. Chaney*, 470 U.S. 821 (1985). The agency's lack of response to the SLS rumor is only one such example; another is the FDA's decision not to respond to a TV program casting doubt on the safety of aspartame, leading to criticism from the National Soft Drink Association. In a Nov. 30, 1998 letter to FDA Commissioner Jane Henney, NSDA's William Ball urged agency officials to set the record straight in cases like this and to point out the errors in such misleading and dishonest journalistic practices. Ball said, By declining to appear in such news reports, it is my view that FDA is avoiding its duty to the public, which regularly looks to the agency for assurances about food safety. *National Soft Drink Association Chastised FDA Last Month*, FOOD CHEMICAL NEWS, Jan. 27, 1999, available at 1999 WL 31463866.



lations likely cannot be stretched to cover Internet rumor campaigns, the agency's regulations governing the misbranding of a product hold more potential.

The FDA's definition of advertising<sup>108</sup> is broad enough to encompass traditional forms of advertising transferred to the Internet. However, it is unlikely that unorthodox negative advertising, centered around e-mail rumors and web sites disparaging a competitor's product as a health or safety risk and mounted by a competitor, comes under the FDA's authority to regulate the advertising of prescription drugs and medical devices.<sup>109</sup> The FDA does consider its advertising regulations to "cover virtually all activities disseminating information about a drug which are done by *or on behalf of* the manufacturer."<sup>110</sup> This statement could conceivably include statements circulated by e-mail or posted on a web site, but it still fails to contemplate dissemination of negative information about a competitor's product.

Misbranding is a much more promising route, with the added benefit of applying to food, cosmetics, and over-the-counter drugs as well as prescription drugs and medical devices. Existing misbranding regulations prohibit false rep-

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<sup>108</sup>Advertising is defined to include "advertisements in published journals, magazines, other periodicals, and newspapers, and advertisements broadcast through media such as radio, television, and telephone communications systems." 21 C.F.R. §202.1(1)(1) (1997). Due to the widespread use of modems and reliance on phone lines, Internet advertising falls into the last category; the term "such as" also provides the FDA with some flexibility.

<sup>109</sup>The FDA's advertising requirements apply only to the "manufacturer, packer, or distributor" of a drug. See 21 U.S.C. §352(n). As such, the agency has no ability of counteract false advertising, no matter how egregious, by a competitor.

<sup>110</sup>Speech by Kenneth R. Feather, Acting Director, FDA Division of Drug Advertising and Labeling (March 14, 1989), *reprinted in* HUTT & MERRILL 462, *supra* note 89 (emphasis in original).

representations about a competitor's product.<sup>111</sup> As such, Internet rumors that could be traced to a competitor would trigger FDA enforcement action. Although the agency has made no definite pronouncement on whether web sites will be regulated as advertising or labeling, the medium is more analogous to printed promotional materials currently classified as the latter, making it more likely that labeling and misbranding regulations would apply.<sup>112</sup>

The key question is whether Internet rumors have enough of a connection to a product to be considered labeling. In order to be considered labeling, the printed matter must "accompany" the product for sale.<sup>113</sup> Regulatory interpretation and case law, which have liberally interpreted the meaning of labeling, support the FDA's ability to regulate the home pages of pharmaceutical companies as labeling.<sup>114</sup> Past precedents could be extended to support the regulation of Internet sources—pamphlets promoting the efficacy of a product,<sup>115</sup> books advocating certain health regimes,<sup>116</sup> and even a radio program generally touting the benefits of vitamins<sup>117</sup> have all been considered fair game for regulation as misbranding. The FDA could likely regulate, for example, the unfounded bashing of SLS found on Neways' home page as misbranded labeling accompanying

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<sup>111</sup> See 21 C.F.R. §201.6(a) (1999). "Among representations in the labeling of a drug which render such drug misbranded is a false or misleading representation with respect to another drug or a device or a food or cosmetic."

<sup>112</sup> See Green, *supra* note 27, at 378-379.

<sup>113</sup> 21 U.S.C.A. §321(m).

<sup>114</sup> *Supra* note at 379.

<sup>115</sup> See *Kordel v. United States*, 335 U.S. 345 (1948) ("No physical attachment... is necessary. It is the textual relationship that is significant...")

<sup>116</sup> See *United States v. Articles of Drug... Century Food Co.*, 32 F.R.D. 32 (S.D.Ill. 1963) ("Certainly, the Act contemplates that a book, as well as any other type of representation, may be so used as to become a label for an article offered for sale.").

<sup>117</sup> See *United States v. Article of Drug... Designated B-Complex Cholinol Capsules*, 362 F.2d 923 (3rd Cir. 1966).

the company's products.<sup>118</sup> Information found on electronic bulletin boards or in e-mail messages, even if it could be argued to "accompany" a product,<sup>119</sup> is less likely to be considered commercial speech, so agency actions to combat rumors found in these forums, in the absence of an explicit commercial link, are more likely to run afoul of the First Amendment.<sup>120</sup>

In the absence of clear statutory or regulatory authority, informal enforcement and publicity are likely to be the most common weapons employed against Internet rumors, as indicated by the FDA's response to the toxic tampons hoax. The agency published information rebutting the rumor and, acting through informal channels, shut down the web site where the rumor originated. These methods are quick to implement—though not so quick as the spread of Internet gossip—and use a relatively small portion of the FDA's limited enforcement budget. If Internet hoaxes become more common—and the current trend indicates that is a likely possibility—the agency may want to develop a systematic response to such hoaxes—perhaps a website dedicated to debunking myths about FDA-regulated products. The FDA may also promulgate regulations specifically aimed at Internet fraud and, in connection with the regulation of Internet

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<sup>118</sup>The argument can be made that Neways' web site presents a literal truth—their products are SLS-free—but their arguments about the harms associated with SLS are misleading and therefore create a misperception about the relative safety and benefits of Neways products.

<sup>119</sup>While there is no definitive answer, an e-mail spreading a false rumor, specifically endorsing an alternate product, and providing information on how to order that product—as with the toxic tampons hoax—could arguably be misbranded labeling "accompanying a product." The FDA did take action against a web site that served as a source for the rumor and presented an identical message, but did not specify what authority it was acting under.

<sup>120</sup>*Cf. Washington Legal Foundation v. Henney*, 56 F.Supp.2d 81 (D.D.C. 1999) (FDA efforts to regulate information on off-label uses of approved drugs violated the First Amendment).

pharmacies, lobby Congress for an increased enforcement budget and subpoena powers similar to those enjoyed by the Securities and Exchange Commission. Increased use of the Internet will logically lead to increased opportunities for consumers to be defrauded or misled, creating pressure on the FDA and other agencies to expand their Internet enforcement capabilities.

### **Federal Trade Commission (FTC)**

Consumer rumors are in some ways similar to the negative advertisements that increasingly mar political campaigns. Rather than building up one candidate (or product), the choice is made to attack the alternative. While the FTC statutes and regulations generally are designed to constrain excessively positive claims about a manufacturer's own product, they also govern the unfair disparagement of a competing good.

Under §5 of the FTC act, the agency possesses broad authority to ban "unfair or deceptive acts or practices."<sup>121</sup> Additional sections of the Act prohibit the dissemination of misleading claims about food, drugs, medical devices, health care services, or cosmetics.<sup>122</sup> The FTC Act has been interpreted to apply with equal force to Internet advertising. "The FTC Act prohibits unfair or deceptive advertising in any medium."<sup>123</sup> If classified as an advertisement, Internet hoaxes that contain a misrepresentation or omission likely to mislead a reasonable consumer to his or her detriment would be considered misleading under

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<sup>121</sup>15 U.S.C. § 45.

<sup>122</sup>15 U.S.C. § 52-55.

<sup>123</sup>Federal Trade Commission, *Advertising and Marketing on the Internet: The Rules of the Road* (visited Jan, 17, 2000) <http://www.ftc.gov/bcp/online/pubs/buspubs/ruleroad.htm>.

the §5 of the FTC Act; hoaxes that cause or are likely to cause consumer injury that cannot reasonably be avoided and does not present a countervailing benefit to consumers or competition fall under the statutory definition of unfair.<sup>124</sup> The crux of the problem is whether Internet hoaxes can be classified as advertising. Promotional web sites listing or even linking to<sup>125</sup> misleading consumer information that benefits their product presumably would be covered, but anonymous e-mails and posted messages are more problematic. The agency does have the ability to regulate false or deceptive statements made by third parties, which include advertising agencies, catalog marketers, or web site designers,<sup>126</sup> but the extension of third-party liability to chat room hosts, Internet service providers, or a person who forwards a hoax e-mail to a friend would be highly problematic.

The FTC has not yet attempted to regulate an Internet hoax as advertising, and victims of Internet-borne rumors may be more concerned with crisis management than testing the scope of “advertising” under the FTC Act. INDA, when confronted by the “toxic tampon” hoax, focused its efforts on working with the FDA to allay consumer fears about a regulated medical device, rather than seeking FTC sanctions against the originators of the hoax. The decision was partly motivated by the non-traditional nature of a rumor as an unfair

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<sup>124</sup> See Lesley Anne Fair, *Federal Trade Commission Advertising Enforcement*, PRACTICING LAW INSTITUTE, November 1999 at 297, available at WL 1148 PLI/Corp 295.

<sup>125</sup> Although this issue has not been resolved, the FTC recognizes the regulatory implications of links connecting various web sites. See TERRY CALVANI, ADVERTISING AND UNFAIR COMPETITION (1999).

<sup>126</sup> See *supra* note 123.

or disparaging advertisement,<sup>127</sup> but more so driven by a desire to counteract the hoax as efficiently as possible. “We quickly realized there was no major upside to rooting out the originator [of the toxic tampon message]. It was more worthwhile to work with FDA and get the message out.”<sup>128</sup> The FTC has tremendous potential to counter Internet hoaxes, but a guidance clarifying the meaning of advertising in that context will likely be necessary before any enforcement actions can be pursued.

The FTC is pursuing three goals in connection with the adaptation of its regulatory mission to the Internet: self-education, the establishment of an Internet enforcement presence, and cooperation with other federal agencies and the FTC’s international counterparts.<sup>129</sup> Beginning in 1997, the agency has conducted “Health Claims Surf Days” in conjunction with law enforcement agencies and other consumer protection agencies. “Staff identified 800 websites containing questionable claims for products advertised to treat cancer, AIDS, heart disease, diabetes, arthritis, and multiple sclerosis.”<sup>130</sup> However, because the FTC lacks the resources to prosecute the operators of each of the 800 web sites, the agency’s enforcement actions were limited to sending a warning letter clarifying the requirements for on-line advertising.<sup>131</sup>

The FTC does have the discretion to pursue more stringent regulatory remedies.

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<sup>127</sup>As Mayberry notes, “It’s not as if the manufacturer of the competing product took out a disparaging ad in the newspaper.” Telephone interview (Jan. 27, 2000).

<sup>128</sup>*Id.*

<sup>129</sup>Remarks by Lee Peeler, Associate Director for the Division of Advertising Practices at the FTC, *FDA and the Internet: Advertising and Promotion of Medical Products, (Presentations)* (Oct. 16, 1996) (transcript available at <http://www.fda.gov/opacom/morechoices/transcript1096/fdainet4.html> at 1-3).

<sup>130</sup>Fair, *supra* note 124, at \*322.

<sup>131</sup>*Id.*

Sanctions for Internet advertising in violation of the FTC Act are identical to penalties faced by fraudulent advertisers in any medium: cease and desist orders backed by sizable fines; injunctions; and, in some cases, refunds to consumers.<sup>132</sup> One remedy of particular value to the victims of an Internet hoax is the FTC's power to order corrective advertising in cases where the mere cessation of a false or misleading advertisement is insufficient to dispel lingering consumer misperceptions.<sup>133</sup> Corrective advertising generally involves the retraction of a positive claim about a manufacturer's own product, but can include corrections of disparaging claims about another's product.<sup>134</sup> In addition to enjoining the dissemination of false or deceptive Internet advertising, the FTC can impose a lifetime ban on participation in Internet commerce for repeated or especially egregious violations.<sup>135</sup>

The FTC also views consumer education as a vital component of Internet regulation, although its focus is on fraud prevention rather than dispelling specific Internet myths.<sup>136</sup> The FTC attempts to educate consumers through an accessible web site that details various Internet scams,<sup>137</sup> as well as through the

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<sup>132</sup> See *supra* note 123.

<sup>133</sup> Fair, *supra* note 124, at \*298.

<sup>134</sup> Cf. *FTC v. Novartis Corp.*, D-9279 (May 27, 1999) (requiring corrective advertising to remedy claim that marketed pills were superior to competitors' medication in alleviating back pain).

<sup>135</sup> See *FTC v. Craig Hare*, No. 98-8194-CIV (S.D. Fla. Sept. 8, 1998) (stipulated permanent injunction imposing lifetime ban on participation in e-commerce against on-line marketer who advertised non-existent merchandise through an Internet auction house).

<sup>136</sup> See, e.g. Federal Trade Commission, *FTC Consumer Alert! FTC Names Its Dirty Dozen: 12 Scams Most Likely to Arrive Via Bulk E-mail* (visited Jan. 17, 2000) <http://www.ftc.gov/bcp/online/pubs/alerts/doznalrt.htm>. Internet hoaxes spreading false rumors about a product do not make the "dirty dozen" list, even though such scams frequently are spread by chain e-mail.

<sup>137</sup> As early as 1996, the FTC had recognized the utility of its web site as a tool for consumer education and outreach, as well as agency self-promotion. See Remarks by Lee Peeler, Associate Director for the Division of Advertising Practices at the FTC, *FDA and the Internet: Advertising and Promotion of Medical Products, Group 4 (Website Links)* (Oct. 17, 1996) (transcript available at

placement of its own deceptive on-line advertisements that scream “You could have been scammed!” to the gullible consumer who attempts to make a purchase.<sup>138</sup> The FDA is better-positioned than the FTC to debunk claims about specific consumer products, but the FTC is well-situated to inform consumers about Internet hoaxes by posting general information, including ways to identify these e-mails or web pages as a hoax, on the portion of its web site devoted to consumer education.<sup>139</sup>

### **Private Actors**

Private legal remedies are available to maligned companies when the government

is unable (as with the Procter & Gamble Satanism rumor) or unwilling (as with the SLS scare) to step in. While government agencies are concerned with the impact on consumers or perhaps an indirect attack on their own reputation, corporations are much more directly impacted by Internet hoaxes. “Next to an act of terrorism, what corporations fear most is that they may be targeted with an outlandish tall tale.”<sup>140</sup> Companies even pay firms to monitor Internet rumors, hoping to head off a hoax before it proliferates on-line.<sup>141</sup>

If preventive strategies fail, corporations targeted by a rumor may choose to pursue different strategies. One option is ignore the rumor in the belief that any rebuttal or change in corporate behavior will increase public exposure to

<http://www.fda.gov/opacom/morechoices/transcript1096/fdainet7.html> at \*21).

<sup>138</sup> See Okie, *supra* note 25.

<sup>139</sup> The FTC provides consumers with a similar on-line pamphlet on recognizing fraudulent health claims. See Federal Trade Commission, *Fraudulent Health Claims: Don't Be Fooled* (visited Jan. 17, 2000) <http://www.ftc.gov/bcp/online/pubs/health/frdheal.htm>.

<sup>140</sup> TURNER, *supra* note 6, at 166 (quoting social psychologist Fredrick Koenig).

<sup>141</sup> See Hartigan, *supra* note 16 at A1.



the negative story without effectively convincing consumers of the rumor’s untruth.<sup>142</sup> This “ignore it and maybe it will go away” approach, exemplified by Colgate’s non-response to being named in the SLS e-mail, has the virtue of being inexpensive and often effective—rumors frequently die out of their own accord.

Other rumors, however, like the link between Procter & Gamble and Satanism, may require more aggressive measures. Companies can sue under a variety of legal theories—Procter & Gamble’s lawsuits against Amway and Amway distributors have included claims for defamation, common-law unfair competition, violations of the Lanham Act,<sup>143</sup> business disparagement, tortious interference with economic relations, fraud, civil conspiracy in violation of the Racketeer Influenced and Corrupt Organizations Act (RICO), and various state statutes.<sup>144</sup> Available claims will vary based on the factual particulars of a specific hoax, but Procter & Gamble’s variety of claims illustrate the availability of multiple options.

However, legal success does not guarantee the death of a rumor. A mid-1980s rumors that Corona beer was contaminated with urine, giving the beer its dis-

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<sup>142</sup>Carl Larsen, *Marketing Memo*, SAN DIEGO UNION-TRIBUNE, July 29, 1987, *available at* 1987 WL 2888000/

<sup>143</sup>Trade libel claims, which permit plaintiffs to bring suit against competitors who make false disparaging claims about their product, are an especially promising strategy. In 1989, §43(a) of the Lanham Act was amended to permit trade libel claims, which previously had been unavailable under federal law. For a discussion of trade libel under both federal and state law, see Michael A. Albert & Robert L. Bocchino Jr., *Trade Libel: Theory and Practice Under the Common Law, the Lanham Act, and the First Amendment*, 89 TRADEMARK REPORTER 826 (Sept.-Oct. 1999).

<sup>144</sup>See, e.g. *Procter & Gamble v. Amway Corp.*, 1999 WL 1116836; *Procter & Gamble v. Haugen*, 179 F.R.D.

tinative yellowish color, originated with Luce & Sons, a competing wholesaler in Reno, Nevada. Corona's America importer sued Luce for \$3 million; the out-of-court settlement required Luce to issue a public statement that Corona beer was 'free of any contamination.'<sup>145</sup> Despite this legal victory, and Luce's formal retraction, the story quickly spread from Nevada to other western states.<sup>146</sup> The lingering association of Procter & Gamble with Satanism and the occurrence of a recent cycle of rumors, despite more than a dozen successful lawsuits, attests to the inadequacy of law in the face of rumor.

#### IV.

##### Conclusion

Internet hoaxes present a new twist on the classic problem of rumor as a tool of

unfair competition. In their response so far to this latest misuse of Internet technology, regulators and private companies alike seem to be treading water. The overall response, while adequate, is cautious and strictly reactive. The current strategies employed to combat Internet hoaxes may serve to contain the consumer confusion and reputational damage caused by a specific rumor, but do nothing to deter other unscrupulous operators from launching whisper campaigns of their own. A tailoring of regulations and a concerted enforcement effort will be necessary to address the increasing problem of consumer rumors.

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<sup>145</sup>FINE, *supra* note 7, at 169-170.

<sup>146</sup>*See* Larsen, *supra* note 142.